No. 84-412

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In the Supreme Court of the United States

October Term, 1984

HOME BUILDERS AND CONTRACTORS ASSOCIATION OF PALM BEACH COUNTY, INC., a Florida corporation, individually and on behalf of all others similarly situated, and Ted Satter Enterprises, Inc., a Florida corporation,

Appellants,

vs.

The BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, Bill Bailey, as Chairman of said Board of County Commissioners, Dennis P. Koehler, Peggy B. Evatt, Frank Foster, and Norman Gregory, as Members of said Board of County Commissioners and George R. Brockway, Building Official of Palm Beach County, Edgar Howell, Building Official of City of Boynton Beach, Roy Reid, Building Official of City of Delray Beach, and Alvin Butterfield, Building Official of Village of Tequesta,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellants respond to the two issues raised in the motion to dismiss. References to the appendix shall mean the appendix in our jurisdictional statement.

ARGUMENT

I.

DID THE DECISION OF THE FLORIDA SUPREME COURT REST ON ADEQUATE NON-FEDERAL GROUNDS AND INVOLVE NO FEDERAL QUESTIONS?

The opinion of the Fourth District Court of Appeal, State of Florida, expressly held that the ordinance did not violate the equal protection provisions of the Federal Constitution (A 9-11).

Appellees state on page 4 that the Florida Supreme Court was not asked to consider the validity of the ordinance under the Federal Constitution. This is not true. We have attached as an appendix to this brief copies of pages 7 through 10 of appellants' brief filed in the Florida Supreme Court which raised the Federal constitutional question.

II.

IS A SUBSTANTIAL FEDERAL QUESTION PRESENTED?

Appellees do not argue that a Federal question is not presented, only whether the question is substantial. It is significant that appellees do not dispute what this ordi-

nance does. Appellees do not deny that a person pulling a building permit in one city must pay a fee which can be used to improve roads in another city where there is no fee charged. Appellees do not dispute that any city can opt out of this ordinance. Appellees do not dispute that only those pulling building permits in 4 of 37 cities, or in the unincorporated area of the County, must pay the impact fee, and that these funds can be used to improve roads anywhere in a 9-square mile zone, the boundaries of which have no relationship to the boundaries of cities. This Court has never permitted residents of one city to be taxed for the benefit of residents of another city.

On page 9 appellees suggest that we have not presented evidence of actual impact on different groups. This is because the trial court enjoined the County from enforcing this ordinance and, because the County itself was in substantial doubt as to whether this ordinance was constitutional, the County has never implemented the ordinance. The fees which were collected prior to the injunction being entered have not been spent, nor have fees been collected during the appellate process. The County should be commended for taking this approach, however we are compelled to point it out in response to the appellees' motion to dismiss.

CONCLUSION

The motion should be denied.

Respectfully submitted,

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APPENDIX

POINT II

THE ORDINANCE IS ARBITRARY AND DISCRIMINATORY AND DENIES EQUAL PROTECTION.

In addition to conflict jurisdiction this Court also has discretionary jurisdiction to review decisions which construe the State and Federal Constitutions under Rule 9.030(a)(2)(A)(ii). In the present case the Fourth District, on pages 5 to 7, construed the equal protection clauses of the Florida and Federal Constitutions not to prohibit the type of discrimination inherent in the ordinance.

In *Osterndorf v. Turner,* 426 So.2d 539 (Fla. 1982), this Court stated on page 545:

> . . . We find there is no rational basis for distinguishing between *bona fide residents* of more than five consecutive years and *bona fide residents* of less than five consecutive years in the payment of taxes on their homes. This disparate treatment of resident homeowners cannot be allowed if our equal protection clause is to have any real meaning. (Emphasis supplied)

If there is no rational basis to distinguish between five year residents and one year residents, there is also no rational basis to distinguish between one who purchases a new home (with an impact fee of $300) and one who purchases a used home (with no impact fee) where the fee is used to improve roads which are open to both homeowners and the general public.

In *Dunedin,* on page 321, this Court stated:

> . . . It is arbitrary and irrational to distinguish between old and new users, all of whom bear the expense of the old plant and all of whom will use the new plant. . . .

In addition to discrimination between old and new users of the roads, which denies equal protection, there is also an arbitrary distinction made between new users (those pulling building permits), which stems from the fact that Palm Beach County is non-charter and Article VIII, Florida Constitution, Section 1(f), allows cities in non-charter counties to exclude themselves from the application of county ordinances. In the present case 33 of the 37 municipalities in the county have opted out. The fees are thus assessed in only four cities.

A copy of a portion of a trial exhibit is included in our appendix on page 28 which reflects the northeastern area of Palm Beach County, showing the geographical zones provided in the ordinance and also showing municipalities which have opted out as being shaded. There are shaded areas (cities which have opted out) in almost every zone. Under the ordinance those pulling building permits in cities which have opted out do not pay the fee, however the funds can be used to improve roads anywhere in that geographical zone, even within the borders of the city which has opted out.

In zone 1 of this exhibit a portion of a city which has opted out of the ordinance is included in the zone. Thus a person who builds a new home in the city in zone 1 does not pay the $300 fee. The person who builds a new home in that portion of zone 1 which is not in the city does pay the fee. The money can be used to improve any through roads in the entire zone, even those within the city limits where residents don't pay.

In *Department of Revenue v. Amrep Corporation*, 358 So.2d 1343, 1353 (Fla. 1978), this Court on page 1353 struck down an intangible tax on accounts receivable because:

> . . . the unequal treatment of identical receivables is based solely on the residence of the parent and is not differentiated in any way on the basis of where the receivable arose or its actual contacts with the State of Florida.

In *Wiggins v. City of Jacksonville*, 311 So.2d 406 (Fla. 1st DCA 1975), Jacksonville passed an ordinance grandfathering in persons having plumbers licenses from a particular town and a plumber from another town challenged the ordinance on the ground that he was denied equal protection. The court held the ordinance invalid because "by accident of geographical location" some plumbers were discriminated against.

In the present case a person pulling the building permit in an unincorporated area of the county will pay a $300 fee, while his neighbor down the street, who happens to be within the boundaries of a city which has opted out, will not pay the fee. It is difficult to conceive of a more blatant example of denial of equal protection.

CONCLUSION

The decision of the Fourth District approving an impact fee for roads not only conflicts with *Dunedin*, but creates confusion in the law which this Court should resolve. The ordinance is also unconstitutional as being arbitrary and discriminatory. Although the Fourth District refused to certify this question as one of great public interest, it is respectfully submitted that it is such an issue, since other governmental agencies will undoubtedly follow the example of Palm Beach County and enact similar or-

dinances. This Court should therefore review this case on the merits.

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By /s/ Larry Klein
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail, this 5th day of March, 1984, to:

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